

**SAIFUDDIN MUSTAFA****A****v.****PP**

COURT OF APPEAL, PUTRAJAYA

**B**

MOHAMED APANDI ALI JCA

LINTON ALBERT JCA

MOHTARUDIN BAKI JCA

[CRIMINAL APPEAL NO: J-05-198-2010]

25 NOVEMBER 2013

**C**

**CRIMINAL LAW:** *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 12,898g of cannabis - Possession of methamphetamine - Whether OKT1 carried drugs together with appellant - Whether common intention existed - Whether appellant's defence a bare denial - Whether benefit of finding given to OKT1 should also be accorded to appellant - Whether conviction of appellant safe*

**D**

The prosecution alleged that Chief Inspector, Mike bin Ibrahim ('SP4') saw the appellant and OKT1 carrying a black bag ('P14') side by side each holding one side of the bag at a bus terminal. The appellant and OKT1 were arrested and upon a search, two types of drugs were found in P14. The appellant was jointly charged together with OKT1 for trafficking in 12,898g of cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') read together with s. 34 of the Penal Code ('PC') ('first charge') and also for possession of methamphetamine under s. 12(2) of the Act read together with s. 34 of the PC ('second charge'). The Judicial Commissioner ('JC') ruled that a *prima facie* case had been established on both charges against the appellant and OKT1. The appellant was found guilty, convicted and sentenced to death for the first charge and an imprisonment term of two years for the second charge. However, OKT1 in his defence testified that he saw the appellant take out something from the luggage compartment of the bus and thereafter, the appellant was seen carrying a black bag when they disembarked at the bus terminal. OKT1 went looking for a toilet and again saw the appellant whom he approached and it was then that he was grabbed from behind and arrested by the police. On the contrary, the appellant testified that he had a black 'Adidas' bag which contained his clothing and was kept at the luggage compartment during the journey. The appellant testified that there was another person carrying a bag beside the appellant but he did not know who that person was. The JC was satisfied that OKT1 had succeeded in raising a reasonable doubt in the prosecution case and acquitted and discharged OKT1 from both charges. Dissatisfied, the appellant appealed against the JC's decision.

**E****F****G****H****I**

**A Held (allowing appeal; setting aside sentence and conviction)**  
**Per Linton Albert JCA delivering the judgment of the court:**

- B** (1) That vital aspect of the prosecution case was demolished when the JC accepted the truth of OKT1's denial that he was carrying P14 together with the appellant. Logic dictated that it was not open to the JC to apply a totally opposite finding that the appellant was carrying P14 together with OKT1 and convict the appellant on that finding, more so when the appellant was jointly charged together with OKT1 for committing the criminal act in furtherance of the common intention. The essential element of common intention was not addressed by the JC. The JC was wrong when he did not apply the finding in respect of OKT1 to the appellant as well. The benefit of the finding given to OKT1 must also be accorded to the appellant. (para 9)
- C**
- D** (2) The JC fell into error because of his finding that the defence put up by the appellant was a bare denial and was thus rejected. The demolition of the prosecution case by virtue of the finding based on the evidence of OKT1 rendered the finding of the appellant's defence as a case of bare denial patently irrelevant. In the circumstances, the conviction was unsafe which warranted appellate intervention. (paras 10 & 11)
- E**

**Legislation referred to:**

Dangerous Drugs Act 1952, s. 39B(1)(a)  
Penal Code, ss. 12(2), 34

- F** *For the appellant - Gooi Soon Seng; M/s Gooi & Azura*  
*For the prosecution - Samihah Rhazali; DPP*
- Reported by Sandra Gabriel*

**G** **JUDGMENT**

**Linton Albert JCA:**

**Introduction**

- H** [1] The appellant was jointly charged together with one Safuadi bin Usman (OKT1) for trafficking in 12,898g of cannabis, an offence in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) read together with s. 34 of the Penal Code. He was also jointly charged together with OKT1 for possession of 3.90g of
- I** methamphetamine under s. 12(2) of the Act read together with s. 34 of the Penal Code. He was found guilty on both charges, convicted and

sentenced to death for the first charge and an imprisonment term of two years for the second charge. OKT1 was, however, found not guilty and accordingly acquitted and discharged on both charges.

### Background Facts

[2] The facts established by the prosecution were straightforward. On 24 March 2006 at 3.50pm in the evening, Chief Inspector Mike bin Ibrahim (SP4) together with his men were on surveillance duty at Larkin Town. SP4 saw two men suspiciously carrying a black bag side by side each holding one side of the bag at the taxi station at the bus terminal building at Larkin. SP4 and his men then tailed the two men until they were close when SP4 then identified himself as a policeman and showed his authority card. Before his men could conduct a body search on the two men, both dropped the bag and tried to run away but were unsuccessful. They were arrested but nothing incriminating was found on them. The two types of drugs which formed the basis of the respective charges were found in the black bag (exh. P14). Also found inside the black bag were a pair of jeans and two pairs of shirt.

[3] Based on the evidence set out above, the learned Judicial Commissioner ruled that a *prima facie* case had been made out on both charges against the appellant and OKT1. The learned Judicial Commissioner made a finding of actual possession in respect of both charges and further invoked the presumption of trafficking concerning the first charge.

[4] In his defence, OKT1 testified that he first got to know the appellant when they were seated next to each other in the bus on the way to Larkin. Both disembarked at the Larkin Bus Terminal and he saw the appellant take out something from the luggage compartment of the bus and later saw the appellant carrying a black bag. He then went looking for a toilet and again saw the appellant whom he approached and it was then that he was grabbed from behind and arrested by the police. At the same time the appellant was in front of him and was also arrested.

[5] The testimony of the appellant was this. On 24 March 2006, he was travelling in a bus from Kuala Lumpur to Larkin. OKT1 was seated next to him and got acquainted with him for the first time. He had with him a black Adidas bag which was kept at the luggage compartment during the journey. The Adidas bag contained his clothing. Upon arrival at Larkin, he collected the bag from the luggage compartment and went on his way. He went first to the toilet and was arrested after that near the taxi station. There was another person carrying a bag beside the appellant but he did not know who the person was.

**A High Court Decision**

**B** [6] The learned Judicial Commissioner made several findings of fact which are crucial to the determination of this appeal. He concluded there were two versions before the court. One version was that of the prosecution to the effect that OKT1 and the appellant were seen together carrying exh. P14, the black bag from which the dangerous drugs were found. The version given by OKT1 and the appellant was they did not carry P14 although the appellant admitted to carrying an Adidas black bag. The learned Judicial Commissioner was also satisfied that there was truth in the evidence given by OKT1 in his defence and ruled that OKT1 had succeeded in raising a reasonable doubt in the truth of the prosecution case.

**D** [7] For completeness, it is perhaps useful to reproduce the relevant parts of the judgment of the learned Judicial Commissioner relating to these findings. They are as follows:

**E** Berdasarkan keterangan tertuduh-tertuduh, mahkamah kini mempunyai 2 versi mengenai bagaimana barang kes dadah telah ditemui dan dirampas. Versi tertuduh-tertuduh yang mencabar versi saksi pendakwaan yang mengatakan dadah ditemui oleh polis dari dalam bag hitam P14 yang dilihat dijinjing oleh dua tertuduh. Saksi SP4 mengatakan dadah ditemui dari dalam bag hitam yang dipegang di tangan oleh dua tertuduh. Tertuduh pertama menafikan sama sekali pernah menjinjing bag hitam bersama tertuduh kedua sebelum ditangkap.

**F** Setelah menilai keseluruhan keterangan di hadapan mahkamah ini, saya berpuas hati bahawa ada kebenaran terhadap keterangan tertuduh pertama dalam keterangan membela diri beliau.

**G** Atas alasan-alasan yang dinyatakan di atas, saya mendapati pembelaan oleh pihak tertuduh pertama telah berjaya menimbulkan keraguan yang munasabah terhadap kebenaran kes pihak pendakwaan.

[8] OKT1 was accordingly acquitted and discharged of both charges.

**Our Decision**

**H** [9] The heart of the prosecution case was OKT1 and the appellant each carrying P14 on either side. The dangerous drugs were found in P14. That vital aspect of the prosecution case was demolished when the learned Judicial Commissioner accepted the truth of OKT1's denial that he was carrying P14 together with the appellant. Elementary logic dictates that it was not open to the learned Judicial Commissioner to then apply a totally opposite finding that the appellant was carrying P14 together with OKT1 and convict the appellant on that finding, more so,

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where as here, the appellant was jointly charged together with OKT1 for committing the criminal act in the two charges in furtherance of the common intention of both of them. It stood to reason, therefore, the essential ingredient of common intention in both charges was also rendered non-existent. Understandably the essential element of common intention was not addressed by the learned Judicial Commissioner. He was plainly wrong when he did not apply the finding in respect of the heart of the prosecution case in respect of OKT1 to the appellant as well. The benefit of the finding given to OKT1 must also be accorded to the appellant. After all, what is sauce for the goose is sauce for the gander.

[10] It is perhaps apt to note that the learned Judicial Commissioner fell into error in the way described above because of his finding that the defence put up by the appellant was a bare denial and was thus rejected. The demolition of the prosecution case by virtue of the finding based on the evidence of OKT1 rendered the finding of the appellant's defence as a case of bare denial patently irrelevant.

### Conclusion

[11] In the circumstances and for the reasons aforesaid, the learned Judicial Commissioner was plainly wrong and by reason whereof the conviction was rendered unsafe which warrants appellate intervention. The appeal is accordingly allowed and the convictions and sentences imposed by the High Court are set aside. The appellant is acquitted and discharged.

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